IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG **CASE NO. A5030/13**

In the matter between:

GERHARD MARNEWECK	**1ST APPELLANT**
BENITA MARNEWECK	**2ND APPELLANT**
NEDBANK LTD	**3RD APELLANT**
and	
WELCOME DLOZI SHABALALA	**1ST RESPONDENT**
HLENGIE HLEZIPHI MAGGIE	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**

JUDGMENT

MONAMA J

[1] The first and second appellants ("**the Appellants**") are husband and wife. During August 1997 they bought an investment property in T[…], Johannesburg. The property is still financed by the third appellant (financial institution). The debt to the third appellant was secured by a bond over the same property. The Property is described as Erf […] T[…] T[...], Registration Division I.R. the Province of Gauteng in the Deeds Office. The Property is situated at 1[…] and 1[…] S[…] Street, T[…], Johannesburg **("the Property").**

[2] The third appellant is the bank duly registered in terms of the Company Law and Banking Laws on the Republic of South Africa.

[3] The first and second respondents (**the respondents**) are married to each other out of community of property. They give their address as 1[…] and 1[…] S[…] Street, T[…], Johannesburg.

[4] The third respondent is a State official charged with the management of the Deeds Office in terms of the Deeds Registries Act 47 of 1937 ("the Act").[1]This office is vital for the proper administration of land in the Republic of South Africa.

[5] During 1997 the appellants bought the Property. They let the property to tenants. During November 2008 the respondents took possession of the property. They evicted the tenants unlawfully. They alleged ownership of the property.

[6] The conduct of the respondents stated in paragraph 5 above made the appellants to investigate. These investigations revealed that the property was registered in the names of the respondents who allegedly purchased it from the appellants for the amount of R200 000.00 which was paid in cash. The registration was preceded by a written contract. The agreement was allegedly entered into by both the appellants and the respondents. The appellants deny the agreement. They disputed the copies of the identity documents used by the respondents. They challenged the signatures. They alleged that their identity documents and signatures were forged. They opened a fraud case at Booysens Police Station. They alleged that the attorney (Ms Mabija) used false clearance certificates.

[7] On 16 February 2010 the appellants launched the motion proceedings in the court *a quo* for the following relief:

7.1 that the alleged contract of purchase between them and the respondents be declared null and void; and

7.2 that the property referred to in paragraph 1 above registered in the names of the respondents be re-registered in their names.

[1] In terms of Section 3 of the Act.

The founding affidavit alleged forgery, fraud and theft of identity. The appellants contended that they are still the registered lawful owners of the Property. Their title deed was not cancelled. They never sold their property to anybody. They are still paying their bond obligations to the third appellant.

[8] The respondents vehemently opposed the application. The respondents filed an answering affidavit. They raised in the main the alleged dispute of facts. These alleged disputes of fact include, *inter alia*, the existence of the two titles over the same property and the sale agreement. The respondents contend that they are the lawful registered owners. They relied on the alleged transfer of 2008. They attached a windeed report which reflects their title to the Property. Their Title Deed is T[…] of 2008. The respondents also raised a point *in limine* of a non-joinder. Save for the non-joinder issue the remainder of the answering affidavit contained bare denials.

[9] On 31 March 2011 the application was fully argued. Eventually, the application was dismissed with costs. In the written judgment of 24 May 2013 the court *a quo* ruled that there was a dispute of facts which cannot be resolved on the papers. It, reiterated the order of 31 March 2011. This time the order excluded costs.

[10] On 24 May 2013 the appellants were granted leave to appeal by the court *a quo* rely. The appellants rely on the fact that the court *a quo* erred in holding that a genuine dispute of facts existed which could not be resolved on the application and that the dispute was foreseeable at the time of the institution of application. The appellants contend that there are no genuine disputes of fact which were foreseeable at the commencement of the motion proceedings claiming the relief mentioned above. They persisted in this view even on appeal. They submitted that the court *a quo* should have adopted a robust approach.

[11] The main issues for consideration are crisp. The first point is whether there was foreseeable dispute of facts. Secondly, whether the alleged disputes could not have been resolved using the "robust approach". The last issue is whether the order in this matter is appealable.

[12] The appeal is still opposed by the respondents. Firstly, they argued that the order of court *a quo* is not appealable. Secondly they contend that there is a serious genuine dispute of facts. This latter point was not seriously pursued in this appeal. Finally the appellants raised the allegations of fraud, corruption and professional misconduct.

[13] The following are facts which are common cause or facts which are not seriously in dispute. The Property is still registered in the names of the appellants. It is bonded to the third appellant. The appellants are still paying the bond instalments. Their Deed of Transfer No T[…] and Covering Mortgage Bond No. B[…] both executed on 7 August 1997 are still valid. The respondents produced a windeed report which reflects their deed of transfer as T[…]. No hard copy of the said Deed of Transfer is attached to the respondents answering affidavit. Finally the respondents have been occupying the property since November 2008.

[14] It is trite that in motion proceedings the parties must establish their respective rights in their affidavit. The affidavit must contain the essential allegations to sustain either their claim or their defences. Therefore the affidavits constitute both the affidavit and the pleadings.

[15] Before I deal with the facts and the applicable test, I must remark about my observations as to how this transaction was handled. I am concerned about the roles played by the attorneys, the conveyancers and possibly the Johannesburg deeds office staff. These officials perform one of the most important role in the administration of land in the province. Their duties are stipulated in the Act[2] and the Attorneys Act 53 of 1997.

[16] As stated above, the conveyancers and the deeds office staff derive their authorities from the Act. The Act also defines their duties. In certain instances, the deeds office is entitled to rely on the conveyancer for certain presentations. The Act provides as follows:

[2] Sections 3, 15 and 15A of Act 47 of 1937 Read with regulation 44A.

*"-Proof of certain facts in connection with deeds and documents by means of certain certificates. – (1) a conveyancer who prepares a deed or other document for the purposes of registration or filing in a deeds registry, and who signs a prescribed certificate on such deed or document**, accepts** by virtue of such signing the responsibility, to the extent prescribed by regulations for the purposes of this section, for the accuracy of those facts mentioned in such deed or document or which are relevant in connection with the registration or filing thereof, which are prescribed by regulation.*

*(2) The provisions of subsection (1) shall apply **mutatis mutandis** to any person other than a conveyancer –*
(a) Who is prescribed by regulation; or
(b) Who is authorized by any other law to prepare a deed or other document for registration or filing in a deed registry,
and who has in accordance with the regulations prepared a deed or other document for registration or filing in a deeds registry.

(3) A registrar shall accept, during the course of his examination of a deed or other document is accordance with the provisions of this Act, that the facts referred to in subsection (1) connection with the registration or filing of a deed or other document in respect of which a certificate referred to in subsection (1) or (2) has been signed, have for the purposes of such examination been conclusively proved: provided that the aforegoing provisions of this subsection shall not derogate from the obligation of a registrar to give effect to any order of court or any other notification recorded in the deeds registry in terms of this Act or any other legal provision, and which affects the registration or filing of such deed or other document." [The underlining and bolding is for emphasis only]

The signature on any document which is necessary for the registration purposes plays an immense role. The signature carries with it some responsibility. Accordingly, there are heavy responsibilities placed on the conveyancers and/or any person acting in matters of conveyancing. Notwithstanding the responsibilities alluded to herein, the registrar's responsibility is not displaced. He has an oversight role to play. However, he can rely on the presentations by the conveyancer.

[17] The Registrar of Deeds was served with the notice of motion and annexures. The founding affidavit contains extremely serious allegations. However, the said official decided not to participate in the proceedings. The failure to participate is to be

regretted in view of the wide scope of its duties and powers and allegations of false rates and taxes certificate.[3] The applicants alleged that:

> *"-Zanele Mabija the principal of the transferring attorney registered the Property using false rates and tax certificates as R52000.00 is still outstanding…."*

The above allegations, like the allegations of identity theft and forgery deserved to have been taken as warning and a sign that there is something wrong. These allegations are unchallenged and become conclusive. Hence I am of the view that there is a *prima facie* case of dereliction of duties in that office.

[18] The roles by Ms M Molepo (the conveyancer) at Chuene Incorporated, the Hlapolosa Attorneys and Ms Z C Mabija of Mabija Attorneys requires an investigation. The provision of Section 15A of Act and Regulation 44A entrusted the conveyancer with the heavy responsibilities. Ms Molepo's explanation is unsatisfactory. She was a conveyancer who executed the documents before the Registrar of Deeds. She made certain representations which were relied upon by the registrar. She did not ensure the cancellation of the bond on the Property. The bond constituted a security for the third appellant. Accordingly, the conduct of the conveyancer contravened her statutory duties. She states in her statement that:

> *"-normally they (Hlapolosa Attorney) will bring their already drafted and signed documents for me to prep and eventually execute them at the Deeds Office, Johannesburg."*

It is not acceptable and certainly not sufficient that she should have relied on the documents drawn by a third party. That constitute in my view a measure of negligence. Regard been had that this property constituted an investment as well as a security it then behoved the conveyancer to become even more vigilant and not prejudice the appellants and the bond giver.

[3] Page 12 Paragraph 20.2 of the Record.

[19] My views about the conveyancer apply *mutatis mutandis* to Hlapolosa Attorneys and Ms Mabija. The latter must explain what happened to the purchase price as well as other allied issues. She cannot claim to be unaware of the serious allegations against her. After all, she commissioned the answering affidavit and certified the respondents identity documents, so she is aware of the allegations directed at her. [21] Ms Mabija an attorney practicing under the names and style Mabija Attorneys received the alleged purchase price. She commissioned the answering affidavit and certified the copies of the identity documents used in the transaction by the respondents. She is accused of a serious offence. In the founding affidavit the appellants alleged that:

> *"-Zanele Mabija the principal of the transferring attorney, registered the property using a false rates and tax certificates as R52, 000.99 is still outstanding on the property in respect of rates and taxes."*

The above allegation is serious and one would expect an attorney to respond thereto even if he is not a party to the proceedings. I am deeply worried about her silence as she must be aware of the allegations due to her close association with the transaction in question. For that reason I am of the view that the matter warrants investigation by the relevant regulatory body.

[20] Cumulatively, all the people referred to herein have caused the appellants some great financial hardship. Forgery is rife and is a serious offence.

[20] The issues in this appeal demonstrate the problem of building, houses hijacking in the areas falling within the jurisdiction of the City of Johannesburg. The hijacking is well organised and intensive. It is prevalent in the area of La Rochelle, Rosetenville, Turffontein and Moffat View where approximately 50% of the houses have been hijacked. The City of Johannesburg has or a long time experienced substantial number of hijacked[4] buildings using forged and fake documentation. The financial institutions, the property owners have endured financial hardship because of the said conduct. Therefore, the conduct of the Respondents and their attorneys is a great concern.

[4] See: Star Newspaper of 31 March 2014.

[21] I now turn to the main argument advanced on behalf of the respondents. The respondents contend that the order of court *a quo* dismissing the application is not appealable. It is trite that "interlocutory" orders are not appealable. However, .the respondents' submission is without merit. The argument is based on the wrong interpretation of the law.

[22] The test of appealability of an order is stated in the **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd.** In that case the court held that:

> "*…a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing*".[5]
> [The underlining mine for emphasize].

Recently the Supreme Court of Appeal re-affirmed the test and stated that:

> "*-A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claim in the proceedings*."[6]

Accordingly, the approach to be adopted by the court is simple. The courts do not only look at the form but the substance of the order as well. If the order disposes of any portion of the issue in the main action or suit that is the end of the matter. The order then becomes appealable.

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[5] 1948(1) SA 839 (AD) at 870.
[6] *Zweni v Minister of Law and Order* 1993(1) SA 523 AD at 532J-533A.

[23] The order appealed against is, in my view, definitive and final. There is nothing more that the appellants can do in the court *a quo*. They cannot rescind the judgment. Any action by the appellants to resuscitate the issue between parties is likely to be defeated by the application of the *res judicata* principle. The argument that the applicants can reinstate the matter is flawed. Therefore, the argument of non-appealability must fail. The Respondents reliance on the decision of **Vena v Vena and Another**[7] and **Webber Wentzel v Batstone and Another**[8] do not support their proposition. Both cases deal with the striking and amendment and not dismissal of an action.

[24] The appellants dispute the documents[9] which were used before and during the transfer. They attach their original documents.[10] The appellants alleged, *inter alia*, fraud of their identities and their signatures. Yet the Respondents do not challenge these documents nor the allegations of fraud[11] in their answering affidavit.

[25] The respondents' version is fraught with some immense difficulties and the appeal is bound to succeed. The test to determine the existence of a dispute of fact is trite. The court must decide whether the dispute is a genuine[12] dispute of fact. Therefore, the party who relie on a defence of a dispute of fact must established it in the affidavit.[13]

The affidavits constitute both the facts and evidence. The litigants are expected to establish their rights in their affidavits. It has been said time and time again that a bare denial as the Respondents have done will not suffice. However, even when there is a dispute of fact the court is entitled to take a robust approach if the case is justified in the circumstances. The contents of the affidavits are the facts which the opponents are asked to act upon. Even where there are genuine facts the court is enjoined to take a robust attitude. The purpose of the affidavits is to inform the involved parties about the matter. Therefore the affidavits must be so drawn as to inform the other party what the matter is about and the facts relied upon. *In casu* there is no genuine dispute of

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[7] 2010 (2)SA 248 (ECP).
[8] 1994 (4) SA 334 (T)
[9] Pages 50 and 51 [Annexures "E1" and "E2"].
[10] Pages 52 and 53 [Annexures "F1" and "F2"]..
[11] Page 12 Paragraphs 20.2 – 20.4 of the Founding Affidavit vis-à-vis Page 55 Paragraph 19 of the answering affidavit.
[12] See: The Civil Practice of High Court Vol.1 Page 293.
[13] *Pountas Trustee v Lahanas* 1924 WLD 67 at 68.

fact. The court *a quo* erred in this regard. If I am wrong on this point, the robust approach should have been followed.

[26] The facts of this case are straightforward. The appellants have raised fraud by respondents. They have accused the attorneys about the false clearance certificate. The appellants' claim is well established in the founding affidavit. It is supported by the undisputed title deed document, the necessary bond documents, a scheduled of bond payments documents and the appellants' undisputed identity documents.

[27] The third appellant has not entered the proceedings. The failure is not fatal. Third appellant's participation would not have taken the application any further. The said failure is different from the failure by the third respondent, who was expected to explain the clearance certificates, the alleged registration of another title on the Property without the proper cancellation of the existing title. Above all. The third respondent has oversight responsibility.

[28] The respondents' raised a mere bare denial in their answering affidavit. This gives an impression that they fail to appreciate and understand the functions of the affidavits They outsourced their responsibilities to respond to the very serious allegations to the third parties. They raised unnecessary and unsustainable points *in limine* of non-joinder.

[29] The appellants acquired the title to the Property in 1997. The Property became maintainable and protected against the whole world. They acquired a higher right, even though we have a negative system of land of registration. The conveyancer who appeared before the Registrar of Deeds ought to have known that there was a bond over the property. She ought to have called for cancellation figures and given guaranties. None of these was done. This omission demonstrates extreme form of negligence. In terms of Section 56 of Act, the Registrar is forbidden to transfer of hypothecated property unless the bond is cancelled. This is so because the bond is a real security. But he might have relied on the presentation by the conveyancer. Mr Molepo's conduct contravenes her duties as a conveyancer.

[30] In the circumstances, I make the following order. The appeal is upheld to the extent that the order of the court *a quo* is set aside and substituted with the following:

1. The written offer to purchase dated 18 April 2008 and which is annexed to the notice of motion as annexure "NOM1" be and is hereby declared null and void.

2. The registration of the property described as ERF […] T[…] T[…], Registration Division I.R the Province of Gauteng, extent 991 square meters held under deed of transfer number T[…] into the name of the first and second respondent be and is hereby cancelled.

3. The property be re-transferred into the first and second appellants' names.

4. The first and second respondents are ordered to pay the costs of this appeal.

5. The copy of this judgment and the entire record should be send to the Registrar of Deeds, Johannesburg and the Law Society of the Northern Province for their further attention. This must be done by the Registrar of the High Court without any delay.

RE MONAMA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

DSS MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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AA LOUW

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the appellants:	Adv. HJ Smith
Instructed by:	Cliff Dekker Hofmeyr Inc, Johannesburg
For the respondents:	MW Dlamini
Instructed by:	Ditheko Lebethe Attorneys

Date of hearing:	26 February 2014
Date of judgment:	April 2014